

Mr. Hoffman submitted the above-captioned application for consent to the assignment of license to TIBS. In November, 1993, SBH petitioned to deny that application on a number of grounds. Those included the prohibition against the sale of a "bare license", as well as the fact that documents (which had been made available to SBH only through the bankruptcy proceeding in 1993) established conclusively that Astroline had engaged in repeated misrepresentations to the Commission and the Courts concerning its supposed minority status. SBH also raised questions concerning TIBS's qualifications to be a Commission licensee. Mr. Hoffman did not respond to SBH's petition, although in January, 1994 TIBS (after more than two months of delay) filed an opposition to SBH's petition. Still, no action was taken on SBH's petition.

13. For the next three years (January, 1994 - December, 1996), there was no apparent change in the status of the Channel 18 proceeding at the Commission. To the best of SBH's knowledge none of the parties filed anything further with the Commission, and the Commission for its part took no action.

14. In the meantime, on February 8, 1996, the Telecommunications Act of 1996 was enacted. Section 403 of that Act amended Section 312 of the Communications Act to include a new subsection 312(g) which reads as follows:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

Despite the very clear Congressional intent that that provision be invoked relative to any station which fails to operate for "any 12-month period", the Commission initially indicated that it would interpret that phrase to mean, in effect, "any 12-month period commencing as of February 8, 1996". See Order, Silent Station Authorizations, FCC No. 96-218 (May 17, 1996). The Commission then issued not one, but two separate public notices advising all licensees that, if a station had been off the air as of February 8, 1996, a failure to recommence operation by February 8, 1997 would result in the automatic, non-waivable loss of license. Public Notice, Expedited Processing, DA 96-818 (May 22, 1996); Public Notice, Deadline Approaching for Silent Broadcast Stations, DA 96-1718 (October 17, 1996).

15. Still, Mr. Hoffman did, and has done, nothing to recommence operation.

16. Instead, TIBS (without any apparent support or participation from Mr. Hoffman, as far as SBH can see) filed its December 12, 1996 Letter Request. In that Letter Request, TIBS asks that it be granted extraordinary relief on an emergency basis. In particular, TIBS seeks to have its assignment application granted immediately. However, as set forth below, TIBS's Letter Request is based on a number of faulty assumptions and a self-servingly incorrect reading of the applicable case law. In fact, grant of TIBS's assignment application without a full hearing would be inconsistent with precedent for a number of reasons. Moreover, in view of the extensive history of this case, grant of the relief sought by TIBS would be plainly

arbitrary and capricious.

II. TIBS's Request Must Be Acted On By The Full Commission.

17. As an initial matter, SBH notes that TIBS's Letter Request is addressed to the Chief, Mass Media Bureau ("Bureau"). But the Bureau does not have delegated authority to act on requests which seek emergency operating authority of more than routine significance or which present novel questions of fact, law or policy. See Section 0.283(a) of the Commission's Rules. TIBS's request is clearly of more than "routine significance", and as discussed below, it presents a variety of novel questions of fact, law and policy. Thus, the Bureau Chief has no delegated authority to act on this matter, and it must instead be referred to the full Commission for disposition (if, that is, it is to be acted on at all).

III. TIBS's Request Incorrectly Assumes That Mr. Hoffman Has A Valid License To Assign.

18. An essential threshold assumption underlying TIBS's request is that Mr. Hoffman currently holds a license which may be immediately assigned to TIBS. That assumption is wrong. As discussed above, Mr. Hoffman's renewal application should have been dismissed in 1991, when Mr. Hoffman failed to file a hearing fee in a timely manner in accordance with the Commission's clear and unequivocal instructions. The Commission itself stated that

**IF A COMMERCIAL APPLICANT HAS BEEN ACCEPTED FOR
FILING IN A PUBLIC NOTICE RELEASED PRIOR TO JULY 1, 1991,
APPLICANT MUST PAY ITS HEARING FEE ON JULY 15, 1991.**

This hearing fee payment requirement also applies to *renewal applicants* where a public notice announcing the acceptance for filing of a competing application was released prior to July 1, 1991.

* * *

Failure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying pending application.

6 FCC Rcd at 3408-3409 (all emphases -- italics, bold-facing and capitalizations -- in original). It is conceded by all concerned that Mr. Hoffman failed to make a timely payment. Thus, his application should have been dismissed.

19. The fact that a representative of the OMD declined to take the action specifically mandated by the full Commission is immaterial. Neither the OMD nor any of its officials has the delegated authority to override or ignore directions from the Commission.^{4/} Here, the Commission directed that a failure to file a timely fee "will result in dismissal" (emphasis added). In view of that unmistakable, mandatory direction, any contrary action (such as the OMD's) by a subordinate official supposedly acting pursuant to delegated authority cannot be presumed to be valid. And, if Mr. Hoffman's renewal application were to be dismissed as required, there would obviously be nothing for Mr. Hoffman to assign to TIBS.

^{4/} Section 0.231(a) does afford to the OMD authority to act on certain fee-related matters, but only "upon securing concurrence of the General Counsel". The OMD letter rejecting SBH's August, 1991 petition to dismiss the renewal application does not indicate that such concurrence was secured, as required by the rules.

IV. In View Of Congress' Clear Language In The Telecommunications Act Of 1996, The Station's License Must Be Deemed To Have Expired Already As A Result Of Mr. Hoffman's Failure To Operate The Station For Almost Six Years.

20. As noted above, in the Telecommunications Act of 1996, Congress' language was clear and unmistakable:

If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

47 U.S.C. §312(g) (emphasis added). Mr. Hoffman has failed to transmit for a consecutive 12-month period -- indeed, he has failed to transmit for a consecutive 68-month period, nearly six times the limit specified by Congress. In view of the clear statutory language, Mr. Hoffman's license must be deemed to have expired.

21. SBH recognizes that the Commission has announced a narrowing interpretation of the statutory language. But that interpretation is plainly at odds with Congressional intent: Congress specified that failure to operate during any 12-month period would be fatal, not just a 12-month period commencing as of some arbitrary date. Further demonstrating Congress' seriousness of purpose in this regard, the statute is made, by its own terms, superior in effect to any other provision, term or condition. It is clear that Congress intended to rid the Commission's records of licensees unwilling or unable to operation their stations. Mr. Hoffman falls comfortably within that category, and has been in that category for almost six years

already.

22. Moreover, it appears from TIBS's arguments that even TIBS recognizes that Mr. Hoffman will not himself be willing or able to recommence operation prior to February 8, 1997. Thus, even if the February 8, 1997 deadline constituted a valid interpretation of the governing law, it is seemingly conceded by all concerned that the present licensee of the station would not be able under any circumstances to meet that inappropriately generous deadline. Under these circumstances, the Commission should acknowledge and accomplish the will of Congress by declaring Mr. Hoffman's license expired. If that were to occur, no further consideration would need to be given to TIBS's Letter Request.

V. Even If Mr. Hoffman Were Deemed, Arguendo, To Have A License To Sell, He Has Nothing More Than That And Is Prohibited From Selling A Bare License.

23. Even if Mr. Hoffman's license were deemed, for the sake of argument, to have survived his failure to tender his hearing fee in a timely manner and his failure to operate the station for the last six years, the fact is that, for the last four years Mr. Hoffman has held nothing more than a "bare license", at best. As SBH alerted the Commission in December, 1992 and again in April, 1993, as of October 16, 1992, all of Astroline's physical assets were acquired by a secured creditor. Included as Attachment A hereto is a copy of a pleading filed in Bankruptcy Court by counsel for that creditor; that pleading plainly reflects that that creditor had taken control of the assets. See Attachment A at ¶8. SBH understands that those assets include

the station's studio and transmitter buildings (and related real estate previously owned by Astroline), its tower, and all transmission and program origination equipment. As a result, while Mr. Hoffman technically remained as the "licensee" of the station, since October, 1992 he in fact has held nothing more than a bare license -- no transmitter, no tower, no real estate, no equipment, no studio, no programming, just a bare license.

24. For more than 25 years it has been well-established that a licensee cannot sell merely a bare license. E.g., Donald L. Horton, 11 R.R.2d 417 (1967); Bonanza Broadcasting Corp., 11 R.R.2d 1072 (1967); Radio Station KDAN, Inc., 12 R.R.2d 584 (1968); Edward B. Mulrooney, 13 R.R.2d 1028 (1968); E. Al Robinson, 33 R.R.2d 593 (1975); Omega Cellular Partners, 5 FCC Rcd 7624 (Mobile Services Division 1990).

25. In Horton, a licensee which had been off-the-air for approximately 18 months (as opposed to Mr. Hoffman's 68-month hiatus) sought to sell its station. The full Commission denied both the proposed assignment and the licensee's request for authority to stay off-the-air. The Commission stated that

the station had been silent [for approximately 18 months] and the licensee could not activate the station in the foreseeable future. . . . Of necessity, the license of the station must therefore be declared forfeit. . . . The fact that an assignment application was pending cannot alter this conclusion, especially since the licensee had little to transfer beyond his license. The Commission will not permit a price to be placed on the transfer of a bare license.

11 R.R.2d at 419-420.

26. Nearly identical facts were presented in Bonanza. There the full Commission followed its decision in Horton,

stating

the assignor's own statement makes clear that it has no equipment to operate the broadcast station, is unable to activate [the station] in the foreseeable future, and is seeking to assign a bare license. . . . We have previously stated that the "Commission will not permit a price to be placed on the transfer of a bare license." [citing Horton]. We will therefore dismiss the assignment application. . . . In light of its inability to return to the air within a reasonable time, the request to remain silent will be denied and the license of [the station] declared forfeit.

11 R.R. 2d at 1073.

27. The KDAN case stated the same policy in connection with the proposed assignment of a station which had been off-the-air for approximately 20 months, and the assets of which had already been foreclosed upon:

The "Purchase Agreement" [for the proposed assignment] listed the [station's] license as the sole subject matter of the conveyance. No other property was listed; indeed, the [assignor/licensee] had no other assets to convey, all the corporation's real and personal property having been sold at the foreclosure sale. The pending assignment thus contemplates little more than the sale of a naked license. Commission policy bars such a sale.

12 R.R.2d at 586 (footnotes omitted). Accordingly, the full Commission dismissed the proposed assignment and declared the license forfeit. Id.

28. In Mulrooney the full Commission again addressed a similar set of facts:

[N]o equipment with which to operate th[e] station exists to assign . . . with the license. Not only will the Trustee [in Bankruptcy] be unable to resume operation of the station, but in liquidating assets he too will be unable to assign anything but the bare license and, as we have said, this cannot be done for any consideration and thus no benefit would be derived for creditors. A broadcast license is not an "asset" of the bankrupt's estate which automatically passes to

the trustee. Jurisdiction over a broadcast license's disposition remains exclusively with this Commission. . . .

13 R.R.2d at 1029. Again, the full Commission declared the station's license forfeit.

29. The same happened in Robinson:

It is apparent that [the licensee] now ha[s] only a bare license, without the physical assets necessary to resume broadcast operation. . . . A bare license is not an asset which can be assigned for consideration. . . . [I]t appears that [the licensee is] not in a position to resume operation at any time within the foreseeable future. Under these circumstances, the license is reduced to a nullity and its cancellation becomes a ministerial act not subject to the notice and hearing provisions of [the Communications Act].

33 R.R.2d at 595-596.

30. This longstanding line of cases retains vitality to this day. In 1990, it was reaffirmed in the following language in Omega:

It is well established that a license is not an asset of the licensee and does not give any property rights in the license itself. . . . Moreover, where a licensee has defaulted to its creditors, where it has no physical plant with which to offer service, and where it has allowed the station to remain dark, the Commission will not permit transfer of the bare license.

5 FCC Rcd at 7624, ¶7 (citing, inter alia, KDAN and Bonanza).
See also Letter (Ref. 1800E1-KAK) of Barbara Kreisman, Chief, Video Services Division to Rena Brodhurst et al. (dated June 29, 1995) concerning Station WBNB-TV, Charlotte Amalie, Virgin Islands (citing, inter alia, KDAN, Bonanza and Horton).

31. In view of this substantial line of cases, it is clear that Mr. Hoffman does not in any event have anything more than a "bare license" -- a bare license which is not assignable. This

was true in 1992 (when SBH first raised the point), it was true in 1993 (when SBH reiterated the point), and it remains true today. Since Mr. Hoffman holds nothing which is assignable, it would plainly be inappropriate to grant the extraordinary relief sought by TIBS, i.e., summary and immediate grant of some assignment.

32. TIBS attempts to avoid this problem by asserting that TIBS acquired a lease for a transmitter site and certain equipment as part of TIBS's deal with Mr. Hoffman. TIBS Request at 4. The only item listed by TIBS as being included in the transaction and, thus (at least according to TIBS) sufficient to satisfy the "bare license" argument was that lease. ^{5/}

33. But there are several problems with that. First, as TIBS is aware, the lease which Mr. Hoffman purported to sell to TIBS was not, in fact, something which he had to sell. Rather, the lease to which TIBS points with pride had terminated, and TIBS was forced to attempt to litigate the matter. From TIBS's Request, it appears that that litigation was ultimately settled, with TIBS effectively acknowledging that TIBS had in fact purchased nothing.

34. This is readily apparent in the "Settlement" which is included as Attachment A to TIBS's Request. First, it must be

^{5/} In the best alchemic tradition, TIBS attempts to make the most of the lease by claiming that the lease actually comprehended "the leasehold right to use the transmitter site" plus "the option to purchase the transmitter site" plus "the right (a chose in action) to enforce these provisions". TIBS Request at 4. As far as SBH can see, all of this simply reinforces that, in addition to the bare license, all that TIBS claims it was receiving was the lease.

noted that that "Stipulation" is dated April 13, 1995 -- i.e., more than a year and one-half after the TIBS assignment application was filed and some 18 months after SBH first raised the bare license argument. In other words, the earliest that TIBS could ever claim (arguendo) to have had some actual contractual interest with respect to the transmitter site was in April, 1995. TIBS's contrary claims to the Commission between January, 1994 and December, 1996 were simply wrong. ^{6/}

35. In any event, though, from TIBS's Request it now appears clear that TIBS is not acquiring any lease from Mr. Hoffman. Any claim that TIBS may have had regarding any such lease appears to have been settled away through the April, 1995 Stipulation. But a close look at that Stipulation demonstrates that, contrary to TIBS's fanciful claims, TIBS really has nothing which could conceivably bolster its defense against the "bare license" argument.

36. First, the Stipulation is not itself a lease, but rather a promise by an entity (Astroline Connecticut, Inc., an entity apparently owned by some of Astroline's principals) to enter into a lease at some future time upon the occurrence of certain events. But the lease which would be entered into would merely provide "space on the tower for the antenna necessary to

^{6/} Despite the fact that the question of exactly what TIBS might be buying in this transaction has been squarely in issue since at least November, 1993, and despite the fact that TIBS seemed to recognize the importance of that question as early as January, 1994 (when it opposed SBH's November, 1993 Petition to Deny), TIBS does not appear to have bothered to amend its application or pleadings to reflect the execution of the April, 1995 Stipulation.

broadcast on Channel 18". Stipulation at 2. The Stipulation makes no reference at all to any equipment which would be available to TIBS as a result of the Stipulation. Indeed, to the contrary (and contrary to TIBS's earlier assertions that the equipment is already on site), Paragraphs 3(C) and (D) of the Stipulation address matters relating to the installation of an antenna and other unspecified "transmitting facilities" which may be "delivered". Presumably, if an antenna and other "transmitting facilities" were already in place and ready for operation, no reference to "delivery" and "installation" of equipment would have been necessary. Thus, the document which TIBS itself relies on undercuts its claims. ^{2/}

37. Moreover, the Stipulation specifies that any lease which might be entered into pursuant to the Stipulation would not commence until "the longer of 90 days after the FCC issues the right to broadcast or when the materials required for the installation of [TIBS's] transmitting facilities are delivered and installed". Stipulation at 3. But that means that, even if the Commission were to grant TIBS's extraordinary Letter Request and issue some "right to broadcast" on January 1, 1997, the

^{2/} Moreover, even if the equipment referred to by TIBS were available -- and SBH emphasizes that, at this point, all signs indicate that no such equipment is available -- that equipment does not include any studio equipment. SBH has determined that the former studio facilities of Station WHCT-TV (at 18 Garden Street) have been taken over for use by another broadcast operation (Channel 10), making them unavailable in any event for TIBS, contrary to the representation in TIBS's application; SBH has also observed that the microwave facilities previously used by Astroline to transmit its signal from the Garden Street studios to the transmitter have been dismantled.

earliest that TIBS could claim access to the transmitter site under the Stipulation would be 90 days thereafter, i.e., in April. In other words, contrary to TIBS's repeated claims concerning its supposed ability to commence operation of the station right away (and in any event prior to February 8), the fact is that even the document on which TIBS places exclusive reliance demonstrates conclusively that TIBS does not have that ability.

38. Finally, with respect to the Stipulation, SBH notes that the party supposedly providing TIBS with the limited opportunity to enter into a lease is Astroline Connecticut, Inc. But according to official records obtained from the Assessor's Office in Hartford, the owner of the property in question (i.e., "the property commonly known as 376 Deercliff Road, Avon, Connecticut", see Stipulation at 1) is not (and has not been, for more than a year) Astroline Connecticut, Inc. Rather, the owner is an entity named AirComm of Avon, LLC, which purchased the property from Astroline Connecticut, Inc. in December, 1995. See Attachment B hereto. From the available records, SBH has no reason whatsoever to believe that AirComm of Avon, LLC is in any way affiliated with Astroline Connecticut, Inc., or that AirComm of Avon, LLC is even aware of (much less agreeable to) the notion of TIBS's proposed installation. Thus, the party to which TIBS claims to be looking to secure access to the transmitter site -- i.e., Astroline Connecticut, Inc. -- is not in a position to provide that access.

39. To summarize the "bare license" argument, then, the

Commission's policy prohibiting sale of a "bare license" is clear, well-established and longstanding. TIBS's original effort to circumvent that policy -- i.e., the claim that TIBS acquired a lease and option to purchase the transmitter site -- was factually unfounded, as subsequent events (including TIBS's own Letter Request) demonstrate. In fact, TIBS did not and could not have acquired any lease interest in anything from Mr. Hoffman.

40. TIBS's next effort to circumvent the "bare license" policy appears in its Letter Request -- i.e., the notion that TIBS now has entered into a "Stipulation" which supposedly gives TIBS "ongoing rights to the transmitter site and associated broadcast equipment." TIBS Request at 5. But, as discussed above, the Stipulation by its own terms does not constitute a lease, nor does it provide any right to any "associated broadcast equipment". To the contrary, its language strongly suggests that no such equipment would be included. Further, the Stipulation makes clear that any lease which might be entered into would not be available until April, 1997, at the earliest -- well beyond the deadline which even TIBS acknowledges must be met. And finally, the current owner of the site in question is not a party to the Stipulation, and TIBS has offered no reason at all to assume that TIBS would ever be able actually to obtain a lease from the actual site owner. Indeed, the fact that TIBS is relying on a Stipulation from a former owner of the site suggests that TIBS may not even be aware that the site was sold a year ago!

41. The bottomline here is that, notwithstanding TIBS's

various glib assertions, the available information -- including even the materials on which TIBS itself relies -- demonstrates that TIBS is not acquiring from Mr. Hoffman anything more than a bare license, and that TIBS would not in any event be in a position to commence broadcasting immediately. Accordingly, the "bare license" policy prohibits grant of the assignment application, whether on an emergency, expedited basis (as requested by TIBS) or at all.

VI. Contrary To TIBS's Claims, Immediate Or Interim Grant Of TIBS' Assignment Application Is Not Consistent With Existing Precedent.

42. In its Letter Request, TIBS relies on a number of decisions to support its claim that grant of the TIBS assignment application is not precluded by the pendency of SBH's application. See Letter Request at 2-3. Review of the decisions cited by TIBS, however, demonstrates that they do not in fact support TIBS's position here.

43. TIBS places primary reliance on Stockholders of CBS, Inc., 11 FCC Rcd 3733, 3748-49 (1995), for the notion that interim grant of an assignment can be accomplished notwithstanding the pendency of a competing application. TIBS's reliance is completely misplaced.

44. For openers, TIBS acknowledges that the Commission's general rule is to defer action on an assignment application where a competing application is pending. But TIBS, citing CBS, asserts that there are two exceptions to this general rule. According to TIBS,

Circumstances that warrant exception to the general

practice include "where the renewal applicant seeking to sell its station has been challenged by a competing applicant and is in bankruptcy," or where such renewal applicant's station "has been dark or silent for a long period of time." Stockholders of CBS, supra.

Letter Request at 2. The language quoted by TIBS is taken from Paragraph 31 of the CBS decision (11 FCC Rcd at 3748). In its quotation, TIBS has conveniently omitted the citations provided by the Commission in support of those propositions.

45. The first language quoted by TIBS is, according to CBS, based on the Commission's decision in Arthur A. Cirilli, Trustee in Bankruptcy, 2 FCC 2d 692, 6 R.R.2d 903 (1966). The second language quoted by TIBS is based on Northwest Broadcasters, Inc., 3 FCC 2d 571, 7 R.R.2d 396 (1966). Even a cursory review of those cases reveals that neither stands for the proposition advanced by TIBS. To the contrary, they clearly support rejection of TIBS's requested relief.

46. In both Cirilli and Northwest, the Commission designated for hearing a renewal application, an assignment application and a competing application for a new construction permit. In so doing, the Commission indicated that, under the circumstances presented, it would be appropriate to compare the qualifications of the proposed assignee and the new applicant, without regard to the comparative qualifications of the actual licensee/proposed assignor. In both cases, the Commission made clear that it was NOT granting the assignment application at all, and would NOT grant the assignment application unless and until

the assignee had prevailed in a comparative hearing.^{8/} The same result occurred in Bennett Gilbert Gaines, 5 FCC Rcd 2052 (Audio Services Division 1990), which is also cited by TIBS. The Commission's own language in CBS reflects precisely the same understanding of the limited scope of these cases.

47. The Commission's decision in Mid-Ohio Communications, Inc., 90 FCC 2d 114, 51 R.R.2d 859 (1982), also cited by TIBS, is clearly distinguishable from the instant case. In Mid-Ohio, the Commission was confronted with a situation in which the various principals of a corporate licensee were in dispute, which resulted in an internal stalemate within the corporation which effectively prevented the taking of any corporate action. The Commission viewed these to be "unique circumstances", noting in particular that the controlling interest in the licensee's stock was in an escrow account and not subject to exercise by anybody, including a trustee or conservator. 51 R.R.2d at 862, ¶7. In the instant case, no such unique circumstances exist. To the contrary, the original licensee, Astroline, is represented here by Mr. Hoffman, a duly-appointed trustee.^{9/} Far from being

^{8/} Indeed, in Capital City Communications, Inc., 33 FCC 2d 703, 23 R.R.2d 845, 851, ¶15 (1972) -- another case cited by TIBS -- the Commission interpreted its decision in Cirilli as follows:

[T]he Commission emphasized that it was not abandoning its basic policy that consent to an assignment or a transfer of a license is contingent upon a finding that the licensee is qualified to receive a renewal.

This, too, supports SBH's position here, and undermines TIBS's position.

^{9/} In quoting from the Commission's decision in Mid-Ohio, TIBS includes language indicating that grant of an assignment may be
(continued...)

unique in any sense, this case is directly analogous to, e.g., Cirilli and Gaines.

48. TIBS also cites The Rex Company, 8 FCC Rcd 3988 (1993). But TIBS's reliance on that decision is a mystery, since that case did not involve any competing application at all!

49. Thus, the authorities primarily relied upon by TIBS do not in fact support its position. To the contrary, they support the position that interim grant of an assignment application is NOT a permissible and authorized action.^{10/} As a result, the relief sought by TIBS -- i.e., immediate grant of its assignment application -- is simply not available.

VII. Immediate, Summary Grant Of TIBS's Assignment Application Is Not In Any Event Possible In View Of Serious Outstanding Questions Relative To The Qualifications Of Both The Assignor And The Assignee, And The Effect Of Those Questions On The Terms Of The Proposed Assignment.

50. Even if some kind of summary grant of the TIBS assignment application were possible, no such grant could occur until a number of important questions concerning the basic

^{2/} (...continued)

appropriate to "ensur[e] continued operation of the station". Letter Request at 2, quoting 51 R.R. 2d at 862, ¶7. This must be a joke on TIBS's part in view of the fact that Station WHCT-TV has already been off the air for almost six years. "Continued operation" indeed.

^{10/} SBH also notes that, with the exception of the Gaines decision, all of the cases relied upon by TIBS were issued by the full Commission. And, as discussed in the text above, the Gaines decision (the only delegated authority action relied upon by TIBS) clearly reflects that the governing Commission policy is NOT to grant interim assignments. All of this reinforces SBH's argument, set forth in Section I, above, that disposition of TIBS's Letter Request must be referred to the full Commission for its consideration.

qualifications of both the proposed assignor and the proposed assignee are examined and resolved. If, for example, the proposed assignor is deemed not to hold a valid license, he would have nothing to assign. A further complication arising in this case is the fact that it is well-established that no assignment can be granted which would result in a significant benefit to any wrong-doers. Thus, Astroline's qualifications and conduct must be scrutinized before any assignment application could be granted in any event. Similarly, it is hornbook law that if a proposed assignee is found not to be basically qualified, that assignee cannot be granted a license.

A. Astroline's Qualifications

51. Mr. Hoffman holds the license of Station WHCT-TV because, and only because, Astroline was successful in acquiring that license in 1984 based on repeated representations that Astroline was a minority-controlled company. But documents internal to Astroline which have only become available to SBH in 1993 (and which were submitted to the Commission, by SBH, in January, 1994) demonstrate that Astroline's acquisition of the station's license was accomplished through blatant and repeated fraud on the Commission, the Court of Appeals and the Supreme Court -- the underlying facts relating to which have been confirmed, and affirmatively endorsed, by Mr. Hoffman himself in pleadings before the U.S. Court of Appeals for the Second Circuit in In re Astroline Communications Company Limited Partnership, No. 96-5112 (2d Cir.).

52. Before the Commission, of course, Astroline held itself

out as a minority-controlled company fully consistent with the Commission's minority distress sale policy. Acting on the basis of those representations, the Commission granted Astroline's initial assignment application pursuant to the minority distress sale policy.

53. As noted above, SBH appealed that decision. In its brief to the Court of Appeals, Astroline quoted the Commission's own standards for whether an entity was qualified to take advantage of the "minority distress sale" policy:

Limited partnerships are designed to encourage trade by uniting parties who possess capital to invest with parties who are willing to expend their energies and efforts actively running a business. Since complete control and management rests with the general partner, the limited partner's investment is akin to that of a corporate shareholder who has limited liability and lacks a voice in the operation of the enterprise.

Astroline Brief in Shurberg Broadcasting of Hartford, Inc. v. FCC, filed May 30, 1985, at 40. According to Astroline in the immediately following sentence in its brief, "[i]t is undisputed that Astroline satisfies the literal terms of the Commission's test" quoted above. Id.

54. Elaborating on that theme, Astroline then asserted that

[t]he members of the limited partnership supply only the station's financing, for which they will receive a return on their investment.

Id. at 42. Astroline also noted "[t]he limited participants' willingness to invest their money while conferring managerial and voting control of the station upon Mr. Ramirez". Id. Again according to Astroline,

the Commission's primary definition of control has always included complete managerial responsibility for the

operation of the station. [. . .] Mr. Ramirez possesses this complete operational control over the management of Astroline, and thus satisfies the basic test of control.

Id.

55. In its own brief to the Court of Appeals, the Commission relied on earlier Astroline's representations along the same lines. Agreeing that "complete managerial control over the station's operations" must be "reposed in the minority general partner", the Commission quoted Astroline's various representations that such control would be so reposed. See Brief of Federal Communications Commission in Shurberg Broadcasting of Hartford, Inc. v. FCC, filed May 15, 1985, at 35-36.

56. Both Astroline and the Commission adhered unflinchingly to these claims before the Supreme Court. For its part, Astroline continued to characterize itself as a "minority-controlled limited partnership" whose structure "complied with the FCC's established criteria for limited partnership's eligibility for distress sales." Astroline Brief in Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, filed February 9, 1990, at 13. It also plainly intimated that it was not itself a mere minority "front". Id. at 42. See also Commission Brief, filed February, 1990, at 14.

57. Thus, all the Court of Appeals and the Supreme Court knew through 1990 was that, by golly, Astroline was and had always been completely controlled by a minority individual, while the non-minority principals of Astroline remained strictly limited partners, "lack[ing] a voice in the operation of the

enterprise" (to use the Commission's own turn of phrase, which Astroline quoted to the Court of Appeals).

58. Review of Astroline's files in connection with the Chapter 7 phase of the bankruptcy litigation, however, shows just how inaccurate those representations were. Documents obtained by SBH from an inspection of the files of Station WHCT-TV have revealed the following:

- an "Authority for Deposit and Borrowing", dated 1985, and executed by Fred J. Boling, Jr. as "General Partner" of "Astroline Communications Company Limited Partnership. This document, which establishes signature authority over certain financial accounts of Astroline at the State Street Bank and Trust Company in Boston, specifically identifies four authorized signatories on behalf of Astroline: Mr. Boling, Herbert A. Sostek, Joel A. Gibbs and Richard H. Gibbs, all of whom are specifically identified in the document as "General Partner[s]". Information which Astroline had submitted to the Commission reflects, by contrast, that these individuals were all principals of Astroline's LIMITED partner. The name of Mr. Ramirez -- the supposedly controlling minority participant and the supposedly sole individual general partner -- does not appear on this document at all.
- a letter, dated December 4, 1985, from Al Rozanski, the station's Business Manager, authorizing that "the collected balance" in the station's account be sent, by routine weekly wire transfer, to an account at the State Street Bank in Boston controlled by Astroline's non-minority principals, an account to which Astroline's supposedly controlling minority principal had no access.
- a memorandum, dated May 28, 1986, from "Al" (presumably Mr. Rozanski) to "Richard" (presumably Mr. Ramirez) describing a revised approach to the station's payables. The new approach specifically includes the sending of payment requests "to Reading" in the form of "transmittal[s]". SBH understands that "Reading" is a reference to the headquarters of Messrs. Boling et al., i.e., the non-minority, supposedly non-active participants in Astroline. In other words, not only were all of the station's "collected" funds being automatically forwarded, weekly, to a bank in Boston, but no station expenses could be paid unless approved, through the "transmittal" process, by Astroline's supposedly non-active, non-minority participants in Reading, a suburb of Boston.

- a letter, dated May 29, 1986, from Mr. Ramirez to Mr. Boling, sending a copy of Mr. Rozanski's memo concerning the transmittal process. This letter expressly reflects Mr. Boling's involvement in the establishment of that process ("Thank you for your help in working this out"), as well as his Reading address. A copy ("cc") of this letter was apparently also sent to Mr. Sostek, another supposedly non-active participant in Astroline.
- "transmittal" letters (including one dated July 21, 1988) from "Rich" (presumably Mr. Ramirez) to Mr. Boling reflecting that payment items sent to Reading for approval included virtually all of the station's payables (such as routine supplies, taxes, insurance, program costs, personal expenses, etc.).
- 1987 tax materials for Astroline Company (the entity which supposedly held a 70% limited partnership interest in Astroline) and Mr. Ramirez. As of 1987, Mr. Ramirez continued to own a 21% overall ownership interest in Astroline (i.e., supposedly satisfying the 20% minimum ownership interest necessary to qualify as a "minority-controlled" company for purposes of the distress sale policy), as far as the Commission had been advised. But according to these tax returns, Astroline Company actually owned 82.0286%, while Mr. Ramirez actually owned 0.7778% -- far, far below the 20% Commission-specified minimum.
- checks written on Astroline accounts over a period of years and signed by Messrs. Sostek and Boling, the supposedly non-active non-minority participants in Astroline. One such check, dated June 8, 1988, bears the printed legend "Astroline Communications Company Limited Partnership, 231 John Street, Reading, MA". That, of course, is Mr. Boling's address.
- a memorandum, dated November 10, 1988, from Baker & Hostetler (at the time, communications counsel to Astroline) specifically acknowledging that Astroline's business structure would not satisfy the Commission's standards for a true limited partnership because, inter alia, of the lack of restrictions preventing limited partners from involving themselves in the day-to-day operation of the business.

Copies of samples of these documents have previously been submitted to the Commission. For the Commission's convenience, they are resubmitted herewith as Attachment C hereto.

59. These documents demonstrate conclusively that, in fact, Astroline was engaged in repeated, gross misrepresentations

throughout the course of its litigation through the Commission, the Court of Appeals and the Supreme Court. There is absolutely no way in which any of these documents individually could be squared with Astroline's representations. Taken as a whole, these documents reflect an extended, uniform course of conduct -- from 1985 (the earliest days of Astroline's tenure at the station) all the way to 1988 (the year in which Astroline's Chapter 11 bankruptcy was initiated) -- which was completely inconsistent with the stories Astroline was telling the Commission and the courts over the same period.

60. How, after all, could Mr. Ramirez be said to "possess complete operational control" when all the station's money was automatically forwarded to accounts controlled by the supposedly non-active non-minority principals in Boston/Reading, when payment of all of the station's expenses required the prior approval of the supposedly non-active non-minority principals, when those supposedly non-active non-minority principals were identified as Astroline's general partners in the establishment of certain bank accounts, when at least one of Astroline's checking accounts featured as a pre-printed address the address of none other than the supposedly non-active non-minority principals, when Astroline's own communications counsel advised it that its "limited partnership" structure was apparently not consistent with Commission policy? How could Astroline continually represent to the Commission that Mr. Ramirez owned a 21% equity interest in Astroline when it was reporting to the

Internal Revenue Service that he actually owned less than 1%? ^{11/}

61. Since these internal documents were unavailable to SBH, the Commission or the courts prior to now, it cannot be said that the issue of fraud and misrepresentation has ever been resolved by the Commission or any Court. But if Astroline's initial acquisition of the license was accomplished through out-and-out fraud, as these documents demonstrate was the case, then the Commission can and should take steps to assure that that fraud is not rewarded in any way, shape or form. The most obvious way to achieve that would simply be to deny the renewal application in light of the available evidence.

62. SBH anticipates that TIBS will take the position that Astroline's misconduct (which, in view of his own representations to the Second Circuit, Mr. Hoffman cannot deny) is of no real consequence here, since Mr. Hoffman, and not Astroline, is the proposed assignor. There are two problems with that approach. First, as noted above, Mr. Hoffman's entire claim to the

^{11/} The Commission does not need to take SBH's word (or the Commission's own independent review of the accompanying documents) relative to the nature of Astroline's misconduct. Mr. Hoffman himself has advised the U.S. Court of Appeals for the Second Circuit that, "[n]otwithstanding the FCC minority preference guidelines", Astroline's supposedly-controlling minority principal in fact owned less than 1% of the company in 1985, 1986 and 1987. Mr. Hoffman also provided the Second Circuit with a detailed description of the nature of Astroline's internal financial arrangements, all of which appear to have been designed to lodge control of Astroline firmly in the hands of its non-minority principals -- notwithstanding the contrary claims it was making to the Commission and the Courts concerning its supposed minority-controlled status. A copy of an excerpt of Mr. Hoffman's brief to the Second Circuit is included as Attachment D hereto.